NO. 804

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

S. BETELL MOORE, Petitioner,

VS.

MAVERICK COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 1,

PETITION FOR WRIT OF CERTIORARI TO COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS SITTING AT SAN ANTONIO

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United States Constitution, par. 1 of Sec. 10 of Art. I, 5th Amendment and 14th Amendment.

Sec. 237, as Amended, of Judicial Code of United States (Sec. 344 of Title 28 of United States Code Annotated).

Chap. 12, page 19, General and Special Laws of 43rd Legislature of Texas, 3rd Called Session, in 1934.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

NO.....

G. BEDELL MOORE, Petitioner,

VS.

MAVERICK COUNTY WATER CONTROL & IMPROVEMENT DISTRICT NO. 1,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE HONORABLE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS AND BRIEF IN SUPPORT THEREOF.

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES

Your petitioner, G. Bedelll Moore, respectfully requests this Court to review by certiorari a judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, sitting at San Antonio, Texas, in which said Court upheld the validity of certain special assessments, aggregating more than $60,000.00, imposed by respondent's board of directors upon various tracts of land owned by your petitioner, situated in the

area over which respondent had and has jurisdiction, thereby overruling your petitioner's insistence that each of said special assessments was thus imposed in violation of your petitioner's rights under every one of these provisions of the Constitution of the United States, to-wit: (a) Paragraph 1 of Section 10 of Article I, providing that no State shall pass any law impairing the obligation of contracts; (b) that part of Article V of Amendments to said Constitution which provides that no person shall be deprived of his property, without due process of law; and (c) that part of Section 1 of the 14th Amendment to said Constitution which provides that no State shall deprive any person of his property without due process of law, nor shall any State deny to any person within its jurisdiction the equal protection of the laws.

This case was thus numbered and styled in said Court of Civil Appeals, to-wit: No. 11,125, G. Bedell Moore, Appellant, vs. Maverick County Water Control & Improvement District No. 1, Appellee. The Supreme Court of Texas denied your petitioner's application to said Court for a writ of error in said cause to said Court of Civil Appeals and **on November 11, 1942,** said Supreme Court of Texas denied your petitioner's motion for a rehearing in said Court on his said application for writ of error, and then ordered that the entire record in said cause be returned to and deposited with the clerk of said Court of Civil Appeals for the Fourth Supreme Judical District of Texas, sitting at San Antonio, where said record now is.

This application for writ of certiorari is accompanied by a certified transcript of the record in said cause, including the proceedings had therein in said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, to which Court your petitioner asks that said writ of certiorari be directed.

STATEMENT SHOWING JURISDICTION OF UNITED STATES SUPREME COURT HEREIN

Some years prior to April 1, 1932, respondent issued and sold $5,058,000.00 of its bonds and used proceeds of bonds in constructing a main canal and its laterals for the purpose of taking water from the Rio Grande River, for the two-fold purpose (a) of irrigating certain land in Maverick County, Texas, some of it owned by petitioner and (b) of selling and delivering water to Central Power & Light Company, a public utility corporation, for use by it in generating electrical current. Said bonds were voted and authorized by a majority of the qualified voters resident in the District. Such authority of voters was, under Texas laws, a condition precedent to issuance and sale of said bonds. By their vote said voters directed and provided that payment of said bonds should be made by means of an ad valorem tax, without limit as to rate or amount, upon all properties situated within the limits of the District, which included irrigable land, non-irrigable land and the City of Eagle Pass; and said bonds were issued and sold pursuant to said provision for their payment. At date of issuance and sale of bonds the laws of Texas did not authorize respondent to issue and sell bonds payable in any manner other than by means of ad valorem taxation; especially, those laws did not authorize respondent to vote, issue or sell bonds payable out of revenues derived from current operations. (Record, ...).

Respondent operated from April 1, 1932, until September 2, 1932, when an unprecedented flood in the Rio Grande River washed out several miles of the main canal. (Record, ...)

After said disaster respondent defaulted on its said bonds and was financially unable to repair its main

canal. Such was the situation until 1935 when these things were done, to-wit:

(a) On June 24, 1935, at an election duly called, a majority of the qualified voters of the District authorized issuance and sale by respondent of three (3) sets of its bonds, namely: (1) $1,858,000.00 of four per cent bonds; (2) $2,000,000.00 of non-interest bearing bonds; and (3) $2,000,000.00 of four per cent bonds. At said election said voters directed and provided that all of said bonds thus authorized by them should be paid solely by means of ad valorem taxation, without limit as to rate or amount, upon all properties situated in the District, which included the City of Eagle Pass and much non-irrigable land;

(b) Public Works Administration bought said $1,858,000.00 of bonds and made a gift of $676,000.00 to respondent, all of which money was used by respondent in repairing its canals and, also, in extending its system of laterals southward so as thereafter to irrigate much additional, irrigable land situated in the District;

(c) Respondent made a contract with said Central Power & Light Company wherein respondent agreed to carry, sell and deliver, daily, to said Company, and the latter agreed to receive and pay specified sums therefor, a specified quantity of water, which contract was to run for forty years;

(d) The owners of said $5,058,000.00 of construction bonds organized a corporation called "Rio Grande Water Power Company" and respondent assigned to said Company, as a trustee for said owners of construction bonds, the entire revenues which respondent was to obtain, for said term of forty years, from Central Power & Light Company in payment for water to be delivered by respondent to said last named company for use by it in generating electrical current;

(e) Said Rio Grande Water Power Company, as trustee, accepted said assignment from respondent in complete liquidation of said $5,058,000.00 of construction bonds. (Record, ...)

The re-financing arrangement of 1935 provided that said $2,000,000.00 of 4% bonds were to be held by respondent in its own safe until thereafter exchanged, if necessary, from time to time, for a like amount of the non-interest bearing bonds above mentioned, and said arrangement further provided that said $2,000,000.00 of non-interest bearing bonds should be placed in escrow under the agreement between respondent and said Rio Grande Water Power Company that if in any year the payments made by Central Power & Light Company for water delivered to it by respondent should be less than $150,000.00, then respondent would exchange not to exceed $50,000.00 of its said 4% bonds, so held in its own vault, for a like amount of said non-interest bearing bonds, so placed in escrow: said arrangement further provided that if in any year the payments made by Central Power & Light Company should exceed $100,000.00 but should be less than $150,000.00, then respondent should and would exchange a sufficient amount of its said 4% bonds for a like amount of non-interest bearing bonds, to represent the difference between $150,000.00 and the total amount paid in such year by Central Power & Light Company for water. (Record, ...)

Prior to the trial below respondent had exchanged a total of $200,000.00 of its said 4% bonds, out of its said issue of $2,000,000.00 thereof, for a like amount of said non-interest bearing bonds originally deposited in escrow; and at time of trial respondent had outstanding $1,858,000 of bonds, held by P. W. A., and $200,000.00 of 4% bonds, held by said Rio Grande Water Power Company for use and benefit of owners

of construction bonds, all of which were cancelled as a part of said refinancing done by respondent in 1935. (Record, ...).

Said refinancing of respondent in 1935 was made pursuant to Chapter 12, page 19, General and Special Laws of Texas passed by 43rd Legislature at its 3rd called session, in 1934.

Said assignment of revenues made by respondent to said trustee for owners of the $5,058,000.00 of construction bonds, in liquidation thereof, was made pursuant to Sections 2, 3 and 4 of said Chapter 12, which provided in substance that a water control and improvement district such as respondent, which had theretofore made or should thereafter make a contract for the sale of water for the generation of electric power, for a period of forty years or less, should have a right to pay its then outstanding bonds by means of an assignment, for such term of years, of all revenues to be derived by said district from such sale of water for power purposes.

Your petitioner concedes that said assignment to Rio Grande Water Power Company as a trustee for owners of the $5,058,000.00 of construction bonds was and is in sufficient compliance with said Chapter 12 **but** your petitioner believes, and here respectfully insists, that, as to him and his lands in this District, all those parts of said Chapter 12 hereinabove mentioned, purporting to authorize respondent to liquidate its construction bonds by said assignment of revenues, for a term of forty years, are void because violative of your petitioner's rights under paragraph 1 of Section 10 of Article I of the Constitution of the United States, providing that no State shall pass any law impairing the obligation of contracts and, also, under that part of Section 1 of 14th Amendment to said Constitution which

provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Your petitioner believes, as in his supporting brief more fully shown, that under the undisputed facts involved herein, he had and has a vested right, a contract right, to require that said $5,058,000.00 of construction bonds of respondent be liquidated only in the manner which was authorized by the voters of the District and expressly agreed upon by and between respondent and the purchasers of said bonds, to-wit: by ad valorem taxation, without limit as to rate or amount, upon **all** properties in the District.

As in his supporting brief more fully developed the revenues of respondent thus assigned in 1935, for a term of forty years, in liquidation of its construction bonds, approximated eight-elevenths of its total revenues from its operations, during the period of time involved herein: moreover, as in supporting brief more fully shown, respondent's remaining three-elevenths (approximately) of its current revenues from its operations, received by it in payment for water sold for irrigation purposes only, proved to be and was utterly insufficient to pay its current expenses of maintenance and operations and, for that reason alone, respondent has been imposing, and is now trying to collect, a so-called "flat rate assessment", for the purpose of supplementing respondent's unpledged or retained revenues from operations. Especially, as in supporting brief more fully shown, said flat rate assessment has been imposed and is being imposed by respondent solely on irrigable lands in the District, whether actually irrigated or not, no part of such assessment being applied to or imposed upon properties in the City of Eagle Pass, real and personal, or upon non-irrigable lands or other property situated in the District. (Record, ...)

As more fully developed in supporting brief, during the entire time involved herein respondent's total revenues from current operations, including the amounts paid from time to time by Central Power & Light Company for water used by it in generating electrical current, were reasonably sufficient to cover respondent's entire expenses of maintenance and operations, year by year, but, because of said assignment of eight-elevenths of its revenues in liquidation of construction bonds, resondent could not have operated except for said flat rate assessment imposed on irrigable land, only. (Record, ...)

As more fully developed in supporting brief, the immediate and direct effect, and doubtless the intended effect, of said method of payment of its construction bonds so used by respondent has been to discriminate heavily against your petitioner and other owners of irigable land situated in this Distrct, in favor of persons owning taxable properties situated in the City of Eagle Pass and all lands in the District other than irrigable tracts. (Record, ...)

Your petitioner believes that said $5,058,000.00 of construction bonds evidenced a three-way contract, the parties thereto being these: (a) Respondent; (b) the purchasers of said bonds; and (c) every person, such as your petitioner, who owned property situated in said District when said bonds were voted, issued, sold and delivered. Authorities in support of this proposition are cited in supporting brief.

It is believed that your petitioner, as the owner of irrigable land situated in the District, had and has precisely the same right, under the Constitution of the United States, to demand that said construction bonds be paid only as originally agreed and contracted, as

had and have the purchasers and owners of said construction bonds.

The "special land assessment" involved herein, and hereinabove mentioned, has been imposed by respondent's board of directors for the sole purpose of "supplementing" the wholly insufficient ad valorem tax imposed by respondent upon all properties in the District, including those in Eagle Pass and also non-irrigable lands in the District, for the purpose of making annual payments on interest and sinking fund payments on respondent's said bonds now outstanding, to-wit: $2,058,000.00. (Record, ...)

All of these last mentioned bonds were issued, sold and delivered by respondent pursuant to the provisions of said Chapter 12, page 19, General and Special Laws of 43rd Legislature of Texas, at its 3rd called session, in 1934, more especially Section 9 of said law.

Said Section 9 provided, in substance, that any water control and improvement district which had made or should make a contract for sale of water for the generation of electrical power, as provided in Sections 2 and 3 of said law, might vote, authorize, issue and sell its improvement bonds and especially that "whenever such improvement bonds shall be issued, provision shall be made prior to issuance thereof for the levy of ad valorem taxes on all taxable property in such district **fully sufficient to pay principal thereof and interest thereon"**: said Section 9 further provided that "for the purpose of supplementing and augmenting" such ad valorem taxes and "to the end of providing additional income with which to liquidate and pay off the bonds of said District as they mature and to pay the interest thereon as it accrues", the District might thereafter annually levy, assess and collect against all land in the District which had been or would be enhanced in value

and improved by reason of the improvements made and to be made, etc., "a special assessment of not more than $5.00 per acre," same to be levied and assessed in a specified manner.

Your petitioner concedes that the particular "special land assessment" involved herein was levied and assessed in substantial compliance with the provisions of said Section 9 **but** your petitioner believes, and here respectfully insists, that said special land assessment is, as to him and his irrigable land in this District, wholly void under said provisions of the Constitution of the United States, for these reasons, to-wit:

As hereinabove stated, and as more fully developed in supporting brief, when respondent's outstanding bonds were authorized by the voters and then issued and sold, it was expressly provided by the voters and in the order of respondent's board of directors authorizing issuance and sale of said bonds that same should and would be serviced and paid by means of an ad valorem tax, without limit as to rate or amount, upon all properties situated in this District. Hence, your petitioner believes that no such special land assessment may lawfully be imposed by respondent upon irrigable lands in this District unless and until, **possibly,** it should definitely appear that said ad valorem tax, without limit as to rate or amount, upon all property in the District, so agreed upon as the sole method for the payment of these outstanding bonds, is wholly insufficient to service these outstanding bonds. And, in this case no such showing was remotely made by respondent as a basis or excuse for the imposition of said special land assessment, imposed upon all irrigable land in the District, whether actually irrigated or not, and on no other property.

It is the earnest insistence of your petitioner, more fully developed in supporting brief, that in fact prior

to and at the time of the issuance and sale of these outstanding bonds, full and adequate provision was made, in compliance with said Section 9 of said Chapter 12, "for the levy of ad valorem taxes on all taxable property in such District **fully sufficient to pay principal thereof and interest thereon,"** and that there would be no possible need for this special land assessment except for this vitally important fact, to-wit: that respondent's board of directors have, from year to year, imposed an ad valorem tax on all taxable property in the District which they well knew was **not** "fully sufficient" to service these outstanding bonds of respondent. The record facts are undisputed and a re set out in supporting brief.

As more fully shown in supporting brief, your petitioner here contends that he has suffered, and will suffer, serious financial injury as the proximate result of (a) the imposition of the flat rate assessment involved herein as a substitute for the current revenues so assigned by respondent in liquidation of its original construction bonds and also (b) the imposition by respondent of the special land assessment involved herein, no necessity or reason for which could or would exist but for the fact that respondent's directors have intentionally discriminated against your petitioner and others similarly situated, in favor of the owners of all properties in the District other than irrigable land, which discrimination has been and is being thus accomplished, to-wit: in place of complying with the provisions of Section 9 of said Chapter 12, and more especially with the mandate of the voters of the District as given on June 24, 1935, and with the terms and provisions of the contract evidenced by respondent's bonds now outstanding, by the imposition and enforcement of an ad valorem tax on all property in the District, "fully sufficient" to meet the annual payments on these bonds, respondent's directors

have imposed a relatively small ad valorem tax on all properties in the District and to make up the resulting deficiency they have imposed and are imposing said special land assessment upon only the irrigable lands in the District, and none thereof on any other properties in the District such as non-irrigable land and properties, real and personal, in the City of Eagle Pass.

The several questions herein presented, arising under the Constitution of the United States, were presented to said Court of Civil Appeals on original submission in printed brief of your petitioner as an appellant in said Court by means of your petitioner's points 8(c) and 8(j), points 11(c) and 11(j), points 13(c) and 13(j), points 14(c) and 14(j), and point 16: also, said constitutional questions were again brought to the attention of said Court of Civil Appeals in these several paragraphs of your petitioner's motion for a rehearing in said Court, to-wit: paragraphs 8(a); 8(d); 11(c); 11(j); 13(c); 13(j); 14(c); 14(j); 16; 75; 79(a); 79(c); 82(a); and 82(c). (Record, ...)

Moreover, said constitutional questions herein presented were urged upon the Supreme Court of Texas, in your petitioner's application to said Court for a writ of error in said cause to said Court of Civil Appeals, in these several points of error, to-wit: points 7, 8, 9, 11, 12, 13, 14, 16, 17 and 18; and in your petitioner's motion for a rehearing in said Supreme Court of Texas, upon his said application for a writ of error from said Court to said Court of Civil Appeals, these questions were again brought to the attention of said Supreme Court of Texas in paragraphs 3, 5, 6, 7, 8, 9, 10 and 11, respectively. (Record, ...)

Your petitioner appends to this statement re jurisdiction of United States Supreme Court a copy of the opinion as originally delivered in and by said Court of

Civil Appeals on original submission and also a copy of the memorandum opinion of said Court rendered when overruling your petitioner's motion for a rehearing in said Court, which was seasonably filed.

Said opinion of said Court of Civil Appeals, as corrected, appears in 162 S. W. (2d), page 1009.

On reading that opinion it is apparent that the Court did not see fit to discuss at all these questions arising under the Constitution of the United States but said Court did specifically overrule all of your petitioner's assignments of error, points and propositions in which these constitutional questions were urged upon said court.

The Supreme Court of Texas wrote no opinion when denying your petitioner's application for a writ of error in said cause to said Court of Civil Appeals, nor did it write such opinion when denying your petitioner's motion for a rehearing in the Supreme Court upon his said application.

As hereinabove stated, said Supreme Court of Texas overruled on November 11, 1942, your petitioner's motion in said Court for a rehearing upon his said application for a writ of error from said Court to said Court of Civil Appeals.

For opinion of the Court of Civil Appeals on original submission see record, ...; for order of said Court overruling motion for a rehearing see record, ...; for order of Supreme Court denying application for writ of error see record, ...; and for order of Supreme Court overruling petitioner's motion for a rehearing upon his said application for writ of error see record, ...

Your petitioner believes that the Supreme Court of the United States has jurisdiction herein under Section

237, as amended, of the Judicial Code of the United States (Section 344 of Title 28 of United States Code Annotated) which provides that the Supreme Court, by certiorari, may require that there be certified to it for review and determination any cause wherein a final judgment has been rendered by the highest court of a State in which a decision could be had, where there is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution of the United States, or where any title, right, privilege or immunity is specially set up or claimed by either party to the cause under the Constitution of the United States.

While your petitioner has included as a part of his supporting brief a substantial copy of said Chapter 12, page 19, General and Special Laws of 43rd Legislature of Texas, 3rd called session, in 1934, your petitioner here summarizes the essential and relevant parts thereof, to-wit:

(a) Section 2 provided that any district such as respondent which had theretofore made, or might thereafter make, a contract for sale of water for the generation of electric power, was thereby authorized to assign said contract for a period of forty years or less, or to assign for forty years or less revenues to be derived by said District from such contract, and to accept a present lump sum as consideration and in payment for such assignment for the entire period, such payment to be made either in cash or in bonds of the District then outstanding, any bonds so received in payment to be immediately cancelled. Section 3 provided that any such district as respondent which should have available water to be sold for the generation of electric power, might sell water for such purpose and make a contract for such sale and that any such contract might provide for de-

livery of water by the District for a period of forty years or less and might provide for the payment for such water either in installments or in one lump sum, and for payment either in cash or in District bonds, any bonds so received to be immediately cancelled. Section 4 provided in substance that such a district as respondent might issue its negotiable refunding bonds for the purpose of refunding any district indebtedness, said refunding bonds to mature serially or otherwise within a period not to exceed forty years from their date, such bonds to bear interest or to be issued as non-interest bearing bonds, same to be approved by attorney general of Texas and registered by State comptroller, such refunding bonds to be exchanged for not less than a like par amount of outstanding District bonds or to be sold and proceeds of sale applied to the redemption of not less than a like par amount of such outstanding indebtedness. Section 5 provided that such a district as respondent might make such agreement as it deemed advisable for deposit in escrow of such improvement bonds or refunding bonds, such escrow bonds to be issued only if the revenues derived from such assignment or sale of water for power purposes should fall below fixed amounts to be specified in the escrow agreement, etc. Section 6 provided that such a district as respondent might provide or agree to provide an emergency fund to be used for repairs to the canal and irrigation system or any part thereof, said fund to be established from proceeds of ad valorem taxes or other revenues of the District, imposed for such purposes.

(b) Section 9 of said Chapter 12, pursuant to which respondent's bonds now outstanding were voted, issued and sold, provided substantially thus:

That such a district as respondent, having a contract for sale of water for power purposes, "is hereby authorized to vote, authorize, sell and issue its improvement

bonds in the manner now or hereafter provided by law for the voting, authorization, sale and issuance of improvement bonds of water control and improvement districts: whenever such improvement bonds shall be issued, provision shall be made prior to issuance thereof for the levy of ad valorem taxes on all taxable property in such district **fully sufficient to pay principal thereof and interest thereon:** all such ad valorem taxes provided for the payment of the principal of and interest on said bonds shall be deposited in a special account known as the 'bond and interest redemption fund', and used for no other purpose, and for the purpose of supplementing and augmenting such special account and to the end of providing additional income with which to liquidate and pay off the bonds of said District, as they mature and pay the interest thereon as it accrues, such Districts shall be authorized to hereafter annually levy, assess and collect against all land within the District which have been and/or will be enhanced in value and improved by reason of the improvement made and to be made and which will be benefited thereby by being made irrigable by gravity, without reference as to whether such land is to be actually irrigated or not, a special assessment of not more than $5.00 per acre, in the following manner", said manner being then fully set out, same providing for a petition in writing signed by a majority of resident land owning voters in the District, publication in newspaper of notice of hearing, a hearing before the board of directors and a finding by the board that it would be for the best interests of the District to impose such special assessment of not more than $5.00 per acre on irrigable land, whether actually irrigated or not. Said "manner" did not include any election or vote by the resident voters in the District.

It seems unnecessary more fully to state the provisions of said Section 9 re such "special assessments of not

more than $5.00 per acre" on all irrigable land whether actually irrigated or not, since petitioner concedes that before issuing and selling its bonds now outstanding respondent substantially complied with the requirements of said Section 9, as far only as concerns what was done with regard to said special assessment. However, as elsewhere herein stated and as more fully shown in supporting brief, your petitioner contends that under the undisputed facts involved herein, as shown in stipulation of the parties hereto, before issuing and selling its outstanding bonds respondent strictly and fully complied with the requirements of said Section 9 that before issuing and selling any such bonds same must be voted and authorized by voters of the District and, especially the requirement that "whenever such improvement bonds shall be issued, provision shall be made prior to issuance thereof for the levy of ad valorem taxes on all taxable property in such District **fully sufficient** to pay principal thereof and interest thereon".

The voters of the District specifically authorized and directed that said outstanding bonds be paid by the levy of an ad valorem tax, without limit as to rate or amount, on all taxable property in this District, which should be fully sufficient to pay principal and interest on bonds: moreover, pursuant to said mandate of the voters, respondent's directors did make, prior to the issuance and sale of these bonds, the levy of an ad valorem tax on all taxable property in the District "fully sufficient to pay principal thereof and interest thereon."

However, as more fully shown in supporting brief, in place of **enforcing** said "levy of ad valorem taxes on all taxable property in the District fully sufficient to pay principal thereof and interest thereon", year by year, respondent's directors disregarded said mandate of the voters and said contract with owners of out-

standing bonds, by the imposition of a small ad valorem tax and by the imposition of the special land assessment involved herein of $1.50 per acre annually on all irrigable land in the District whether actually irrigated or not, and on nothing else, thereby discriminating against owners of irrigable land in the District, in favor of the owners of all other properties in the District, including those in Eagle Pass.

It is of this glaring discrimination that your petitioner specifically complains.

Various Texas cases, cited in brief, squarely support this proposition, to-wit: that as the owner of irrigable land in the District your petitioner had, and has, a direct interest in what was done by the voters of the District on June 24, 1935, and more especially in having the bonds authorized on that date by the voters paid by means only of ad valorem taxation, without limit as to rate or amount, upon all properties in this District; and that your petitioner was and is a party to the contract evidenced by the proceedings had in 1935 and especially by the bonds of respondent now outstanding. It is obvious that the smaller the ad valorem tax on all properties in the District imposed and collected by respondent, the greater the special land assessment upon all irrigable land in the District, since the sums realized by respondent out of said ad valorem taxes and said special land assessment have been and were necessary to meet the annual payments on its outstanding bonds, interest and sinking fund payments. The actual figures relating to this matter are shown in supporting brief.

CASES BELIEVED TO SUSTAIN THE JURISDICTION

A. Cases showing the jurisdiction of the Court because of the impairment of petitioner's rights under paragraph 1 of Section 10 of Article I of United States

Constitution, providing that no State shall pass any law impairing the obligation of contracts:

Murray vs. Charleston, 96 U. S., 432;
Wolff vs. New Orleans, 103 U. S., 358;
Ralls County Court vs. United States, 105 U. S., 733;
Louisiana vs. Pillsbury, 105 U. S., 278;
Seibert vs. Lewis, 122 U. S., 284;
Barnitz vs. Beverley, 163 U. S., 118;
Houston & Texas Central Ry. Co. vs. Texas, 107 U. S., 243;
Graham vs. Folsom, 200 U. S., 248;
Hendrickson vs. Apperson, 245 U. S., 105 (62:1 78);
Columbia Ry. Co. vs. South Carolina, 261 U. S., 236 (67:629);
Lynch vs. United States, 292 U. S., 571 (78:1434);
Worthen Co. vs. Kavanaugh, 295 U. S., 56 (79:1298);
Treigle vs. Acme Homestead Association, 297 U. S., 189 (80:575);
Indiana vs. Brand, 303 U. S., 95 (82:685).

Under the foregoing cases, more especially Murray vs. Charleston, it is immaterial that said Court of Civil Appeals did not in direct terms discuss or refer to any of the provisions of the Constitution of the United States on which your petitioner relies herein.

Indisputably, if the imposition by respondent on petitioner's lands of either the special land assessment or the flat rate assessment involved herein impairs the contract rights of your petitioner, this Court has power to grant the writ and afford petitioner adequate relief.

B. Cases supporting your petitioner's insistence that the imposition by respondent of the special land assessment on only the irrigable lands in the District for the purpose of paying respondent's outstanding

bonds, which were agreed to be paid solely by means of ad valorem taxation upon all properties in the District, has deprived your petitioner of that equal protection of the laws guaranteed to him by Section 1 of the 14th Amendment to United States Constitution, are as follows, to-wit:

Louisville Ry. Co. vs. Greene, 244 U. S., 522 (61:1291);

Sioux City Bridge Co. vs. Dakota Co., 260 U. S., 441 (67:340);

Louisville Gas Company vs. Coleman, 277 U. S., 32 (72:770);

Cumberland Co. vs. Board of Revision, 284 U. S., 23 (76:146).

C. That the Court has jurisdiction to afford petitioner relief herein under the due process clause of the 5th Amendment of United States Constitution see these cases, to-wit:

Home Telephone Co. vs. City of Los Angeles, 227 U. S., 278 (57:510);

Ettor vs. Tacoma, 228 U. S., 148 (57:773);

Truax vs. Corrigan, 257 U. S., 312 (66:254);

Forbes Pioneer Boat Line vs. Board of Commissioners, 258 U. S., 338 (66:647);

Sioux City Bridge Co. vs. Dakota Co., 260 U. S., 441 (67:340); and

Brinkerhoff, etc. Co. vs. Hill, 281 U. S., 673 (74:1107).

THE QUESTIONS PRESENTED

Briefly restated, the questions herein presented are these:

(a) That respondent's original construction bonds ($5,058,000) should have been paid exclusively by means of ad valorem taxation upon all property in the

District, as was authorized by the voters and as was expressly agreed at time of issuance and sale of said bonds; and that your petitioner's rights under paragraph 1 of Section 10 of Article I of United States Constitution and under the 5th Amendment to said Constitution and under the 14th Amendment to said Constitution have been violated because in place of so paying said bonds by means of ad valorem taxation, only, respondent paid them by means of an assignment, for a term of forty years, of approximately eight-elevenths of respondent's operating revenues, which assignment rendered it necessary for respondent to impose the flat rate assessment involved herein in order to pay current expenses of maintenance and operations, year by year; and

(b) That your petitioner's rights under the aforesaid provisions of the Constitution of the United States have been violated in this respect, to-wit: when respondent's bonds now outstanding were voted, issued, sold and delivered, it was specifically agreed that same should and would be paid by means of an ad valorem tax, without limit as to rate or amount, upon all properties in the District, in which contract re mode of payment of said bonds your petitioner had and has a direct interest, a vested right; but in place of thus paying said bonds respondent has imposed a wholly inadequate ad valorem tax and in place thereof has substituted the special land assessment involved herein; and

(c) That whether so intended or not by respondent and its directors, the direct and proximate result of the imposition of said special land assessment, and also of said flat rate assessment, has been to bring about an illegal discrimination in said tax matters against your petitioner and others similarly situated, owning irrigable lands in the District, in favor of persons owning other properties in the District such as non-irrigable lands, property in Eagle Pass, etc., thus denying your peti-

tioner the equal protection of the laws and due process of law and impairing his contract rights.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1st: It is believed by your petitioner that as the owner of irrigable lands in the District he had, and has, a vested right to require that respondent's construction bonds ($5,058,000.00) be paid solely in the manner originally agreed upon to-wit: by means of an ad valorem tax, without limit as to rate or amount upon all properties in the District, and that your petitioner's rights under the Constitution of the United States, in the several respects already stated, have been violated and disregarded by respondent when in place of paying said bonds by the contract method, respondent paid same by an assignment, for forty years, of approximately eight-elevenths of its current revenues from operations, and was thereby forced to impose the flat rate assessment involved herein on all irrigable land in the District in order to raise sufficient money with which to pay its current expenses of maintenance and operation.

2nd: Your petitioner further believes that his rights under said several provisions of the Constitution of the United States have been violated by respondent because the latter has been imposing the special land assessment involved herein for the purpose of paying, in large part, respondent's outstanding bonds, whereas same should be paid exclusively and only by means of the ad valoren tax without limit as to rate or amount upon all property in the District which was authorizel by the voters of the District and agreed upon by respondent with the purchaser of said bonds: said provision for payment by means of ad valorem taxation, only, was an integral part of every bond authorized by

the voters on June 25, 1935, and since then sold and delivered by respondent; and

3rd: Your petitioner believes that his rights under said provisions of the Constitution of the United States have been violated and disregarded by respondent, and that the latter has discriminated against your petitioner and others similarly situated, owners of irrigable lands in the District, by using the special land assessment involved herein as a method of wrongfully shifting much of the burden of taxation from all properties in the District, on the basis of value, to and upon the owners of irrigable lands in the District, such as your petitioner.

4th: Your petitioner believes that in the several respects hereinabove indicated said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas has erroneously decided Federal questions of substance not heretofore specifically determined by the Supreme Court of the United States, or, in the alternative only, that said Court of Civil Appeals has decided said Federal questions contrary to or not in accord with applicable decisions of the Supreme Court of the United States.

SUMMARY SHOWING WHEN AND HOW FEDERAL QUESTIONS WERE RAISED IN STATE COURT

As the appellant in the State court your petitioner in his "eighth point" complained of the error of the trial court in awarding respondent judgment for $38,-328.44 of "flat rate assesments", imposed to pay maintenance and operating expenses of respondent, petitioner urging that said assesments were void because violative of your petitioner's rights under the 14th Amendment of the Constitution of the United States and also under paragraph 1 of Section 10 of Article I of said Constitution. By his "eleventh point" in said court your petitioner complained

of the error of the trial court in awarding judgment against your petitioner for $24,899.64 on the "special land assessments" involved herein because said assessments violated your petitioner's rights under paragraph 1 of Section 10 of Article I of the Constitution of the United States and also under the 14th Amendment of said Constitution. By his "thirteenth point" in said court your petitioner complained of the error of the trial court in granting respondent judgment against your petitioner for $3,735.47 of "emergency fund assessments", because said assessments were imposed in violation of your petitioner's rights under paragraph 1 of Section 10 of Article I of the Constitution of the United States and also under the 14th Amendment of said Constitution. By his 'fourteenth point" your petitioner complained of the error of the trial court in upholding the assignment made to Rio Grande Water Power Company as a trustee for owners of respondent's construction bonds of all revenues derived by respondent from its sale of water to Central Power & Light Company, for a term of forty years, in liquidation of respondent's construction bonds, and therein your petitioner further insisted that in the imposition of said flat rate assessment and also of said special land assessment respondent violated the rights of your petitioner under paragraph 1 of Section 10 of Article I of Constitution of United States, and also under the provisions of the 14th Amendment of said Constitution. In his "sixteenth point" in his brief in said Court of Civil Appeals your petitioner insisted that the trial court erred in overruling your petitioner's objections to special issues submitted by the trial judge to the jury relating to the special land assessment, the flat rate assessment and the emergency fund assessment involved herein, said objections based on the ground that the undisputed proof shows, as matter of law, that every one of said assessments was discriminatory as

to your petitioner, your petitioner's reasons for said contention as to alleged discrimination being therein more fully set out. (Record, ...)

In his motion for a rehearing filed in said Court of Civil Appeals your petitioner carried forward, in various forms, all and singular the points hereinabove mentioned, doing so in these paragraphs of his said motion for rehearing, to-wit: 8(a); 8(d); 11(c); 11(j); 13(c); 13(j); 14(c); 14(j); 16; 75; 79(a); 79(c); 82(a); and 82(c). (Record.....)

These Federal questions were brought to the attention of the Supreme Court of Texas in various "points" or paragraphs of your petitioner's application to said Court for a writ of error in said cause to said Court of Civil Appeals, as follows, to-wit:

By his seventh point your petitioner complained of the error of the Court of Civil Appeals in affirming the validity of the special land assessment involved herein notwithstanding the fact that said assessment has been imposed to assist in payment of respondent's bonds now outstanding, which were authorized by the voters and issued and sold by respondent under express contract that same should be paid only by means of ad valorem taxation without limit as to rate or amount on all properties in the District.

By his eighth point your petitioner insisted that said Court of Civil Appeals erred in affirming the validity of said special land assessment involved herein, imposed to assist in paying respondent's outstanding bonds, which were issued and sold under express contract that they should be paid wholly by ad valorem taxation and, especially, because in fact an ad valorem tax on all property in the District was levied or made by respondent prior to issuance and sale of said bonds,

which tax was "fully sufficient" to pay principal and interest of said bonds, all in compliance with the statute pursuant to which said bonds were voted, issued and sold.

By his ninth point your petitioner complained that said special land assesment was imposed by respondent for the purpose of discriminating against owners of irrigable land in the District for this, to-wit: respondent's outstanding bonds were authorized, issued and sold under express contract that they would be paid exclusively by means of ad valorem taxes, without limit as to rate or amount, on all property in the District and, concurrently with the issuance and sale of said bonds, respondent imposed such ad valorem tax which was "fully sufficient" to pay said bonds, principal and interest, but respondent in place of assessing and collecting said ad valorem tax, pursuant to original levy, has been imposing a wholly inadequate ad valorem tax, which respondent knew would not yield sufficient money with which to pay said bonds and respondent then imposed said special land assessment on only the irrigable lands in the District, thereby intentionally discriminating against petitioner and others similarly situated and in favor of owners of all other classes of property situated in the District.

By his point eleven your petitioner complained of the error of the Court of Civil Appeals in treating as valid all that part of Section 9 of Chapter 12 of General Laws enacted at 3rd called session of 43rd Legislature of Texas which related to a special land assessment to "supplement and augment" an ad valorem tax which was required by the first part of said Section 9 itself to be "fully sufficient" to pay both principal and interest of respondent's bonds.

By his point twelve your petitioner urged that re-

spondent's bonds now outstanding were voted, issued and sold upon express contract that they should and would be paid by means only of ad valorem taxation, without limit as to rate or amount on all property in the District and therefore respondent has no right to pay any part of said bonds by special land assessments.

By his point thirteen your petitioner urged that said Court of Civil Appeals erred in upholding the validity of the flat rate assessment involved herein notwithstanding the fact that during every fiscal year involved respondent's revenues, from sales of water to Central Power & Light Company for power purposes and to farmers for irrigation purposes, were sufficient to pay respondent's current annual expenses of maintenance and operation.

By his fourteenth point your petitioner complained of error of the Court of Civil Appeals in affirming the validity of the assignment of revenues which respondent made in 1935, for a term of forty years, to a trustee for owners of respondent's original construction bonds, which should have been paid as originally contracted and agreed viz: by means of ad valorem taxation without limit as to rate or amount upon all property in the District, but for which unlawful assignment respondent would have had sufficient revenues from its operations to pay its current expenses of maintenance and operation.

By his seventeenth point your petitioner urged on the Supreme Court of Texas the error of said Court of Civil Appeals in overruling your petitioner's insistence that he had and has a vested right, a contract right, to require that respondent's construction bonds be paid solely by means of ad valorem taxation, in strict accordance with the mandate of the voters pursuant to which said bonds were issued and sold by respondent

and in strict accordance with the terms and provisions of said bonds themselves and the order of respondent's board of directors pursuant to which said bonds were issued and sold by respondent: therein your petitioner insisted that in liquidating said original bonds by said assignment of revenues, for a term of forty years, respondent violated the rights of your petitioner under paragraph 1 of Section 10 of Article I of United States Constitution and also under the 5th Amendment and the 14th Amendment of said Constitution. .

By his eighteenth point in the Supreme Court your petitioner contended that said Court of Civil Appeals erred in overruling your petitioner's insistence that since respondent's bonds now outstanding were authorized by the voters and then issued and sold pursuant to the express contract that they should and would be paid by means only of ad valorem taxation without limit as to rate or amount on all taxable property in the District, the special land assessment involved herein violates your petitioner's vested rights, his contract rights, under paragraph 1 of Section 10 of Article I of United States Constitution and also under the 5th and the 14th Amendments to said Constitution.

In your petitioner's motion in the Supreme Court of Texas for a rehearing upon his application for a writ of error to said Court of Civil Appeals your petitioner again brought to the attention of said Supreme Court of Texas the Federal questions involved herein by means of these paragraphs of his said motion, to-wit: 5, 6, 7, 8, 9, 10 and 11.

In said 5th paragraph of motion your petitioner urged that the Supreme Court of Texas erred in denying his application for writ of error because thereby said Court erroneously approved the error of said Court of Civil Appeals in upholding the error of the trial court

in refusing to hold that all those parts of Chapter 12, Acts of 43rd Legislature of Texas, 3rd called session, page 19, which attempted to authorize respondent to pay, by means of sale and transfer, for not more than forty years, of all of its revenues to be derived from its sale of water for use in generating power, respondent's bonds which were authorized by the voters, and then issued and sold, under express contract that they would be paid only by means of ad valorem taxation upon all property in the District, without limit as to rate or amount, your petitioner insisting that said action of said Supreme Court of Texas violated the rights of your petitioner under all and singular these provisions of the Constitution of the United States, to-wit: the 5th Amendment, the 14th Amendment and paragraph 1 of Section 10 of Article I of said Constitution.

In the sixth paragraph of his said motion for rehearing in Supreme Court of Texas your petitioner again urged on said Court of Civil Appeals that his rights under paragraph 1 of Section 10 of Article I of United States Constitution and under the 5th Amendment of said Constitution and under the 14th Amendment of said Constitution were violated because respondent liquidated its construction bonds ($5,058,000.00) by means of an assignment to a trustee for the owners of said bonds, of certain revenues of respondent, for a term of forty years, whereas said construction bonds should have been paid solely by means of ad valorem taxation without limit as to rate or amount on all properties in the District.

In the seventh paragraph of his said motion for rehearing your petitioner urged on the Supreme Court of Texas that the imposition on your petitioner's land of the special land assessment involved herein, so imposed for the payment of respondent's bonds now outstanding, violates your petitioner's rights under paragraph 1 of

Section 10 of Article I of Constitution of United States and also under the 5th and the 14th Amendments to said Constitution.

In paragraph 8 of his said motion for a rehearing your petitioner again insisted that respondent's judgment against your petitioner for $38,328.44 "flat rate assessment" was and is erroneous because said flat rate assessment violates your petitioner's rights under these several provisions of the Constitution of the United States, to-wit: the 5th Amendment, the 14th Amendment and paragraph 1 of Section 10 of Article I.

In the ninth paragraph of his said motion for rehearing your petitioner again insisted that the judgment against him for $24,899.64 of "special land assessment" was and is erroneous because said special land assessment violates your petitioner's rights under these provisions of the Constitution of the United States, to-wit: the 5th Amendment, the 14th Amendment and paragraph 1 of Section 10 of Article I thereof.

In the tenth paragraph of his said motion for rehearing your petitioner again urged that the judgment in favor of respondent and against petitioner for $3,-735.47 of emergency fund assesments was and is void because said tax violates the rights of your petitioner under these provisions of the Constitution of the United States, to-wit: the 5th Amendment, the 14th Amendment and paragraph 1 of Section 10 of Article I thereof.

In paragraph eleven of said motion for rehearing your petitioner urged on Supreme Court of Texas that the assignment of revenues made by respondent to Rio Grande Water Power Company as a trustee for owners of respondent's original construction bonds in the sum of $5,058,000.00 violated your petitioner's rights under these provisions of the Constitution of the United States:

the 5th Amendment, the 14th Amendment and paragraph 1 of Section 10 of Article I thereof.

Said Court of Civil Appeals wrote an opinion upon original submission of the cause in that court, in which it really discussed only questions of law arising under the Constitution and Statutes of the State of Texas: however, in said opinion the court among other things said: "Appellant also asserts that the arrangement whereby the proceeds derived from the sale of water for power purposes are used for the retirement of bond obligations of the District is invalid because of Constitutional provisions," not stating which "Constitutional provisions" were relied on by petitioner as appellant in that court. There the court also said as follows: "The contracts involved provide for, and the Act of the Legislature permits, the use of funds derived from the sale of water for the purpose of retiring the bonded indebtedness of the District. No Constitutional provision has been cited which either prohibits the use of such funds for bond retirement purposes or requires that such funds for bond retirement purposes or requires that such funds be first applied to the discharge of maintenance and operation charges of the District before the balance may be used for bond retirement purposes. We therefore hold that, as against the attack here presented, the bonds of the District, as well as the contracts entered into as a part of the general refinancing and rehabilitating plan of 1935, must be considered valid and binding." In this connection, in fairness to your petitioner it should be stated that never at any time, in any court, has he "attacked" any of respondent's bond issues: on the contrary, he has always recognized the validity of those issues and his sole contention has been and still is that both the original construction bonds and the bonds now outstanding should be paid solely in the manner contracted and agreed upon, to-wit: by

means of ad valorem taxes without limit as to rate or amount upon all property in this District.

In that opinion said Court of Civil Appeals virtually conceded that the methods of assessment and of payment of respondent's bonds "will place a more onerous burden on lands lying within the District but outside the city (of Eagle Pass) than they would bear under ad valorem assessments." However, the court then said: "This result is not **necessarily** (boldface ours) inequitable in the Constitutional sense," then referring only to certain provisions of the Constitution of Texas. There the court also said: "It cannot be said that the statute, Article 7880-147z (which is the same as Chapter 2, page 19, Laws enacted by 43rd Legislature of Texas at its 3rd called session in 1934, as carried into Vernon's Texas Civil Statutes) violates the due process clauses of either the State or Federal Constitution." The Court was there referring to the special land assessment involved herein and then completely overlooked or ignored the indisputable proposition that when respondent's present bonds were authorized by the voters, issued and sold, a levy of an ad valorem tax which was "fully sufficient" to liquidate said bonds in accordance with their terms, was authorized by the voters and levied by respondent's board of directors, and the further fact that there could and would have been no possible reason or necessity for the imposition of said special land assessment except for the refusal or failure, at least, of respondent's directors annually to assess and collect ad valorem taxes pursuant to said original levy of such ad valorem tax without limit as to rate or amount on all property in the District.

The court then considered "appellant's attacks upon the flat rate assessment and the assessments for the amortization and emergency fund" and held that both assessments were valid and overruled your petitioner's

"points attacking the validity of the 'flat rate' and 'amortization and emergency fund' assessments", and at the end of the opinion in general, but all inclusive, terms overruled every point or assignment of error presented by your petitioner to said Court of Civil Appeals.

Said opinion upon original submission and said memorandum opinion on motion for rehearing are as follows, to-wit:

This is an appeal from a judgment allowing appellee, Maverick County Water Control and Improvement District No 1, a recovery of $68,511.54 against appellant, G. Bedell Moore, and awarding a forclosure of various liens against real property owned by appellant and situated within the boundaries of the water district.

The total amount of the judgment includes the following items: (1) $1,547.99—ad valorem taxes for the year 1940. [1] (2) $24,899.64—special land assessments for bond retirement purposes. [1] (3) $38,328.44—flat rate assessments, [2] and (4) $3,735.47—amortization and emergency fund assessments. [2] The last three items mentioned covered the years of 1936 to 1940, both inclusive.

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[1] " * * * Whenever such improvement bonds shall be issued, provision shall be made prior to issuance thereof for the levy of ad valorem taxes on all taxable property in such district fully sufficient to pay principal thereof and interest thereon. All such ad valorem taxes provided for the payment of the principal of and interest on said bonds shall be deposited in a special account known as the 'Bond and Interest Redemption Fund,' and used for no other purpose and for the purpose of supplementing and augmenting such special account and to the end of providing additional income with which to liquidate and pay off the bonds of said district as they mature and pay the interest threeon as it accrues, such districts shall be authorized to hereafter annually levy, assess and collect against all lands within the district which have been and/or will be enhanced in value and improved by reason of the improvements made and to be made and which will be benefited thereby by being made irrigable by gravity, without reference as to whether such land is to be actually irrigated or not, a special assessment of not more than five ($5.00) dollars per acre, in the following manner: The Board of Directors of such district, upon being presented with a petition in writing signed by a majority in number of all of the land owners within such district whose lands are to

Appellant's brief contains twenty-two points, many of which are subdivided into numerous propositions. We shall therefore not attempt a separate discussion of each of the points or the numerous propositions asserted thereby. Appellee's petition stated a cause of action and no serious attack upon the validity of the ad valorem tax is presented.

Appellee is a water control and improvement district organized under the provisions of Article 16, Section 59, of the Texas Constitution and Chapter 25 of the General Laws of the 39th Legislature, 1925, and amendments thereto. Articles 7880-1 to 7880-147z, inclusive, Vernon's Ann. Civ. Stats.

Appellant contends that each and all of the assessments charged against his lands are illegal and unenforcible under various sections of the State Constitution, particularly Article 16, Sec. 59, Subdivision c, which provides that:

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be affected thereby, shall adopt a resolution declaring that in their judgment it is advisable and for the best interest of such district, and will be a benefit to the lands and property included in said district and affected thereby, to levy and collect annually the special assessment hereinabove referred to. Such resolution shall be entered in the minutes, and notice of its adoption shall be given by publication in a newspaper having general circulation in the county in which such district is situated. Such notice shall be published once a week for two consecutive weeks; the first publication must appear not less than ten (10) full days prior to the time set down for the hearing. Such notice shall state the time and place of hearing and shall set out the resolution in full. It shall notify all interested persons to appear and offer testimony for or against the proposal contained in the resolution. If, upon such hearing, the Board of Directors find that it would be advisable and for the best interest of the district, and would be a benefit to the lands and property situated in said district and affected thereby then, and in that event, such Board shall enter its order so finding, and said district shall thereupon be authorized to levy and assess and collect annually thereafter a special assessment against all of the lands within such districts as are or to be made irrigable by gravity, without reference as to whether such land is to be actually irrigated or not. * * * " Acts 1934, 43rd Legislature, 3rd Called Session, Chapter 12, page 19. Article 7880-147z, Sec. 9, Vernon's Ann. Civ. Stats.

[1] "* * * The board of directors, on or as soon as practicable after a date in each year to be fixed by a standing order of the board, shall carefully estimate the expense to be incurred during the

"The Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment, and all such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as may be prescribed by law and shall also, authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds; and also for the maintenance of such districts and improvements, and such indebtedness shall be a lien upon the property assessed for the payment thereof; **provided the Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any re-**

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course of the next twelve months for the maintenance and operation of the irrigation system. A proportionate part of the amount so estimated, not less than one-third, nor more than two-thirds, to be determined from year to year by the board of directors, shall be paid by assessment against all irrigable lands within the district, pro rata per acre; that is to say, against all lands to which the district is in condition to furnish water by its then systems of canals and laterals, or through extensions thereto of then existing laterals, but without reference as to whether such land is to be actually irrigated or not, and the remainder of the amount so estimated shall be paid by the persons taking water or applying for water as aforesaid." Acts 1925, 39th Legislature, Ch. 25, page 116, Sec. 109; Art. 7880-109, Vernon's Ann. Civ. Stats.

' " * * * The board of directors of each district shall cause to be made by a competent engineer an inspection and valuation of all the physical properties of such district, subject to decay or obsolescence, injury or damage by any sudden, accidental or unusual cause whatsoever, and based upon inspection and valuation said engineer shall determine as nearly as may be, a sum to be annually set aside as will be sufficient to pay for replacement of each item of such physical property at the end of its economical life, or for the restoration or replacement of any such physical property upon the happening of such loss, injury or damage thereto. Out of the maintenance and operation fund, as the same shall be collected, such board of directors shall set aside such portion thereof as shall be necessary to make each year the amount of the annual sum determined as above provided to be known as the 'Amortization and Emergency Fund,' and no part of such fund shall be expended except to replace such amortization property, or to replace or restore such lost, injured or damaged property." Acts 1925, 39th Legislature, Ch. 25, page 115, Sec. 104; Art. 7880-104, Vernon's Ann. Civ. Stats.

clamation district unless such proposition shall first be submitted to the qualified property tax-paying voters of such district and the proposition adopted." (Boldface ours.)

Appellant also asserts that the arrangement whereby the proceeds derived from the sale of water for power purposes are used for the retirement of bond obligations of the district is invalid because of constitutional provisions.

In the year 1935, and after the adoption by the Legislature of Article 7880-147z, Vernon's Ann. Civ. Stats. (Acts 1934, 43rd Legislature, 3rd Called Session, Chapter 12), the District entered into certain contracts with the representatives of the holders of the district's bonds in the amount of $5,058,000, Rio Grande Power Company, a corporation formed by the bond holders, the Central Power and Light Company, a public service corporation, and Public Works Administration, a federal agency, whereby, in effect, all claims based upon bonds theretofore issued by the district would be surrendered in consideration of the district's agreement to pay to Rio Grande Water Power Company approximately $150,000 a year, in cash, or 4% interest-bearing bonds of the district for a period of forty years. This undertaking was secured by an assignment for a period of forty years of all revenues derived from a contract which the district had with Central Power and Light Company, relating to the sale of water for the purpose of generating power. The district, by a vote of the property tax-paying voters of the district, authorized the following bond issues:

(a) $1,858,000 4% bonds, sold to the P. W. A.

(b) $2,000,000 non-interest bearing bonds, held by Rio Grande Water Power Company.

(c) $2,000.00 4% bonds held by the District.

By an agreement between the District and the Rio Grande Water Power Company, it was provided that should the proceeds from the sale of water to Central Power and Light Company be less than $100,000 the District would exchange $50,000 of its 4% bonds for a like amount of non-interest bearing bonds of the District; that in the event the proceeds from sale of water exceeded $100,000, but were less than $150,000, interest-bearing bonds totaling the amount of the difference between $100,000 and $150,000 would be exchanged. In the event the amount realized from sale of water for any one year was $150,000 or more, the Water Power Company obligated itself to deliver to the District $50,000 of non-interest bearing bonds.

There is no merit in appellant's attack upon the legality of the various contracts and agreements above mentioned. It may be here pointed out that Article 16,

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[1] Appellee district was originally organized as a water improvement district in accordance with Chapter 2, Title 128, Rev. Civ. Stats. 1925. Articles 7622 et seq., Vernon's Ann. Civ. Stats. On August 6, 1929, it was converted into a water control and improvement district. This action was confirmed and validated by a special act of the Legislature in 1930. Chapter 2, Special Acts of 41st Legislature, Fourth Called Session.

In 1927 the property tax paying voters of the district authorized the issuance of two bond issues, aggregating the principal sum of $6,600,000. $5,058,000 of said bonds were sold and the proceeds thereof used for construction purposes. The District commenced actual operations in April, 1932. In September of that year an unprecedented and particularly disastrous flood of the Rio Grande occurred. Appellee's main canal was destroyed and the district ceased to be operative. Prior to this disaster the district had entered into a contract with the Central Power and Light Company under the terms of which it delivered water to said company for power purposes. As a result of the inability of the district to perform, this contract was cancelled.

As a result of negotiations between and among representatives of the holders of the district's bonds, the board of directors of the district, the Central Power and Light Company and the Public Works Administration the district was rehabilitated and again set upon an operating basis. The P. W. A. made an outright grant of $676,000 to the district and purchased $1,858,000 of the bonds of the district. The sums of money so realized were used in repairing and reconstructing the canal system of the appellee. The P. W. A. grant and loan was a part of the general plan of rehabilitation and refinancing which gave rise to the contracts mentioned above.

Sec. 59, of the Constitution does not require that the board of directors of a water control and improvement district submit every agreement or contract made by them to a vote of property tax-paying voters of the district. Such a vote is required only for the issuance of bonds or the providing for an indebtedness. Each of the bond issues of 1935 were authorized by the requisite constitutional vote. It further appears that the refinancing plan adopted, including bonds authorized and the various contracts executed, were in conformity with the provisions of Chapter 12 of Acts of the 43rd Legislature, Third Called Session 1934. Article 7880-147z, Vernon's Ann. Civ. Stats. This Act was in full force and effect at the time of the bond election and may properly be considered as a part of the proposition voted upon at said election. State ex rel. Abney vs. Miller, 133 Tex. 498, 128 S. W. 2d 1134.

The contracts involved provide for, and the Act of the Legislature permits, the use of funds derived from the sale of water for the purpose of retiring the bonded indebtedness of the district. No constitutional provision has been cited which either prohibts the use of such funds for bond retirement purposes or requires that such funds be first applied to the dsicharge of maintenance and operation charges of the district before the balance may be used for bond retirement purposes. We therefore hold that, as against the attack here presented, the bonds of the district, as well as the contracts entered into as a part of the general refinancing and rehabilitating plan of 1935, must be considered valid and binding.

Having held that the bond issues of the District are valid, we next consider appellant's contention that the "special land assessments" are unenforcible. These assessments are made for bond retirement purposes and, as above pointed out, such assessments are expressly authorized by statute. The record shows that the dis-

trict complied with the requisite statutory procedure in adopting the plan of assessment and placing the same in operation.

Appellant contends that funds used for bond retirement purposes must be acquired from a tax levied upon an ad valorem basis, and from that source only. He points out that the City of Eagle Pass lies within the boundaries of the district, and that the levy of an assessment upon a "benefit basis," as provided for in Article 7880-147z, Sec. 9, will place a more onerous burden upon lands lying within the district but outside the City, than they would bear under ad valorem assessments.

This result is not necessarily inequitable in the constitutional sense. The particular provision applicable to reclamation districts, such as the one here involved, provides that the Legislature shall "authorize the levy and collection of *** taxes, equitably distributed ***." Constitution, Art. 16, Sec. 59, subd. (c).

This provision was construed by the Supreme Court shortly after said amendment became effective, and in Dallas County Levee District No. 2 v. Looney, 109 Tex. 326, 207 S. W. 310, Chief Justice Phillips clearly indicated that either a tax upon an ad valorem basis or a special assessment upon a benefit basis was permissible under the constitutional provision that taxes must be "equitably distributed." See also City of Wichita Falls for the use and benefit of L. E. Whitham & Co. v. Williams, 119 Tex. 163, 26 S. W. 2d 910.

It can not be said that the statute, Art. 7880-147z, violates the due process clauses of either the State or Federal Constitutions. It was not necessary for the property tax-paying voters of the district to expressly authorize assessments on a benefit basis. The statute, Article

7880-147z, Sec. 9, does not require it, and Article 16, Sec. 59, of the Constitution provides only that the issuance of bonds and provision for indebtedness shall be authorized by the property tax-paying voters at an election. Methods of payment of duly authorized bonds and indebtedness are proper subjects of legislative selection, as long as the requirement that taxes be equitably distributed is not violated. Further, as pointed out above, Article 7880-147z was in force and effect at the time the bonds here involved were authorized by the property tax-paying voters of the district. State ex rel. Abney v. Miller, supra.

We hold, therefore, that no reversible error is shown in connection with the recovery allowed appellee upon the special land assessments involved.

We next consider appellant's attacks upon the flat rate assessments and the assessments for the amortization and emergency fund.

These assessments are commonly referred to as "service charges" and may be considered together.

Appellant contends that these service charges are invalid because they were not authorized by a vote of the property tax-paying voters of the district. As supporting this contention, he relies upon the case of Brown County Water Improvement District No. 1 v. Austin Mill and Grain Co., Tex. Civ. App., 128 S. W. 2d 829; Id. 135 Tex. 140, 138 S. W. 2d 523.

The Brown case is not in point. It deals with the validity of an ad valorem tax for maintenance purposes and not with a flat rate assessment, or with an amortization and emergency fund assessment.

The constiutional distinction between the ad valorem tax and the assessments here involved is clear and well

defined. In Lower Colorado River Authority v. McCraw, 125 Tex. 268, 83 S. W. 2d 629, 633, it was directly held that the constitutional vote required by Article 16, Sec. 59, subd. (c), was applicable only "to bonds and indebtedness to be paid **out of tax funds.**"

As pointed out by this Court in Brady v. Hidalgo County Water Control and Improvement District No. 12, 56 S. W. 2d 298, affirmed 127 Tex. 123, 91 S. W. 2d 1058, service charges, such as the assessments here involved, can not precede, but can only follow, irrigation operations. Service charges are based upon the ability of the district to deliver water to and render service for the benefit of particular lands within the district. Such assessments can not be made against lands to which the district is unable to deliver water, nor for which no appropriate service can be rendered. Clearly, these charges and assessments are not "taxes" within the meaning of the term as defined and discussed in Lower Colorado River Authority v. McCraw, supra. See Hidalgo and Cameron Counties Water Control and Improvement District No. 9, v. American Rio Grande Land and Irrigation Co. (5th Cir. Ct. of App.) 103 Fed. 509.

Not being taxes, it is not necessary to the validity of their assessment that an indebtedness authorized by a constitutional vote be existent, as in the case of an ad valorem tax.

In the Brown County case both the Court of Civil Appeals and the Commission of Appeals speak of "maintenance **taxes**" not having been authorized by the property tax-paying voters of the district. Appellant construes this language to mean that any method of raising funds for maintenance purposes must be so authorized. But, as pointed out by the Commission of Appeals, the constitutional prohibition is primarily against indebtedness (which, under the Lower Colorado River Authority

case, means an indebtedness payable from **tax** revenues) and consequently no valid ad valorem **tax** for maintenance, or, we may add, for any other purpose could be levied unless an indebtedness had been authorized by proper vote. The tax follows the indebtedness, and there can be no enforcible levy in the absence of a legally authorized indebtedness. The Brown County case simply holds that no ad valorem tax could be levied to pay an indebtedness which was legally non-existent. Had there been a legally authorized indebtedness, the validity of the tax could not be disputed. The case, therefore, turns upon the absence of a legally authorized indebtedness and not upon the absence of a vote upon the method of raising funds for the payment of the maintenance and operation expenses of the district.

The service charges here attacked not being "taxes", it follows that appellant's point attacking their validity must be overruled.

We also overrule appellant's contention that a portion of the recovery awarded appellee by the trial court was barred under the terms of Article 5526, Vernon's Ann. Civ. Stats. Hidalgo and Cameron Counties Water Control and Improvement District No. 9 v. American Rio Grande Land and Irrigation Company, 103 Fed. 2d 509.

No reversible error being shown, the judgment of the trial court is affirmed.

MEMORANDUM OPINION ON MOTION FOR REHEARING

The following corrections have been made in the original opinion:

Page 4, line 2, the word "several" is substituted for "numerous".

Page 4, line 5, the word "serious" is eliminated.

Page 5, lines 11 and 12, the word "were" is substituted for the words "would be."

Page 8, line 17, the word "is" is substituted for "was."

Page 9, line 17, the word "County" is inserted.

Page 10, lines 10 to 33, inclusive, are eliminated from the opinion, Rule 452, and in place thereof the following is substituted:

"Appellant's points attacking the validity of the "flat rate" and "amortization and emergency fund" assessments are overruled."

We adhere to our holdings expressed upon our original disposition of this cause and appellant's motion for rehearing is overruled.

CONCLUSION

In conclusion, your petitioner respectfully renews his prayer that the Supreme Court of the United States will by its order direct that a writ of certiorari be issued out of and under the seal of said Honorable Court, same to be directed to said Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, sitting in San Antonio, commanding that Court to certify and send to the Supreme Court of the United States a full and complete transcript of the record and of all of the proceedings in the cause numbered and entitled on its docket thus: "No. 11,125. G. Bedell Moore, Appellant, vs. Maverick County Water Control & Improvement District No. 1, Appellee", to the end that said cause may be reviewed and determined by the Supreme Court of the United States as provided by the Statutes of the United States, and that in due course the judgment of said

Court of Civil Appeals for the Fourth Supreme Judicial District of Texas be reversed by the Supreme Court of the United States; and your petitioner prays for such other and further relief as the Court may deem proper.

Dated at San Antonio, Texas, on February 6th, A. D., 1943.

Respectfully submitted,

G. BEDELL MOORE,
Petitioner

By .....
J. B. Lewright,
Attorney for said Petitioner.

(23)

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IN THE

Supreme Court of the United States

October Term, 1942.

No. 804

G. BEDELL MOORE, Petitioner,

versus

MAVERICK COUNTY WATER CONTROL AND IMPROVEMENT DISTRICT NO. 1, Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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LOGUE PRINTING CO., SAN ANTONIO, TEXAS

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OPINIONS OF THE COURTS OF THE STATE OF TEXAS.

The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas is reported in 162 S. W. (2), 1009, and is in the record at pages 34-42.

Pertinent portions of the judgment of the Trial Court are in the record at pages 21-33. There was no opinion filed by the Trial Court nor by the Supreme Court of Texas in Application for Writ of Error in the case.

JURISDICTION

Petitioner, G. Bedell Moore, seeks to invoke the jurisdiction of this Court to review the decision of the case by the Courts of Texas on a claim that a Federal question is involved. Respondent respectfully replies that THERE IS NO FEDERAL QUESTION INVOLVED IN THE CASE, because:

1.

Petitioner, solely as an owner of irrigable land within the limits of respondent District, first contends that he had a contract right to require respondent District to make, and the holders of its original construction bonds to receive, payment of those bonds out of ad valorem taxes, and that such right was violated when those bonds were surrendered and cancelled in 1935 by the voluntary action of the owners and holders thereof. Following the destruction of the District's main canal by a flood in 1932, all of its outstanding bonds were voluntarily surrendered and cancelled in consideration of a loan and grant to respondent District from Public Works Administration with which to rehabilitate the District, and an assignment for the

benefit of the holders of those bonds of revenues to accrue under a contract for the sale of surplus water to a power company (R. pp. 65-68). No such right was asserted by petitioner in 1935, at the time the rehabilitation contracts were entered into, the original construction bonds surrendered and cancelled, the loan and grant from Public Works Administration made in reliance thereon, and the power sale contract entered into, and none of the parties to those contracts, whose rights would be adversely affected under petitioner's contentions, are before the Court in this case.

Petitioner's claim of jurisdiction in this court is, therefore, without merit for the following reasons:

(a) The cancellation and surrender of the original construction bonds of respondent District in 1935 was effected through the voluntary action of the holders of those bonds (R. pp. 66-67) and was not the result of any **State action** and does not contravene Article I, Section 10, of the Constitution of the United States.

(b) The issuance of original construction bonds by respondent District, with payment thereof secured by ad valorem taxes, did not prevent the District using any other asset available to it for retiring those bonds with the consent of the holders thereof.

In **Dallas County** vs. **Lockhart,** 128 Tex. 50, 96 S. W. (2) 60, the Supreme Court of Texas held and said:

"The effect of the provisions is to pledge the tax revenue as security, but that does not prohibit the payment of the bonds from any other lawful source. Ballard-Hassett Company vs. City of Des Moines (Iowa) 218 N. W. 20."

(c) The voluntary surrender and cancellation of the original construction bonds of respondent District was made by the holders thereof in consideration of the assignment of the revenues under the contract for the sale of water for power purposes and in consideration of the loan and grant made to respondent District by Public Works Administration for the purpose of rehabilitating the District following the disastrous flood of 1932 (R. p. 65). Neither the holders of the more than $5,000,000.00 in principal amount of original construction bonds, the Public Works Administration, who made the loan and grant for rehabilitation purposes **in consideration of the cancellation of the original bonded indebtedness of the District,** nor the Central Power & Light Company, who has been making payment under the assignment for the benefit of the holders of the original construction bonds, are parties to these proceedings, and a decision that the holders of the original construction bonds of the District could not voluntarily, and in agreement with the District and the Administrator of Public Works Administration, surrender and cancel those bonds, would materially

affect the rights of all those parties who are not present in court.

(d) Petitioner, as the owner of irrigable lands in respondent District in 1935, along with other owners in the District, received the benefits of the surrender and cancellation of the crushing burden of more than $5,000,000.00 in principal amount of 6% bonded indebtedness of respondent District and of the loan and grant from Public Works Administration for rehabilitating the District, through which the value of his lands was enhanced from that of six to ten dollars an acre as dry ranch lands to ninety-five to one hundred and thirty-five dollars an acre as irrigable lands (R. p. 68). His contention in this case is an attempt to make a collateral attack upon the action of the duly constituted officers and directors of respondent District in rehabilitating the District through the agreement for the surrender and cancellation of the original bonded indebtedness and the loan and grant from Public Works Administration in a suit brought by the District for the collection of charges and assessment duly levied and assessed by the District in strict conformity with the laws of the State of Texas.

2.

Petitioner asserts, in the second place, that the making of special benefit land assessments by respondent District supplementing an ad valorem tax levy, for use in servicing outstanding bonds, violates

a contract right claimed by petitioner to require that such bonds be paid out of ad valorem taxes solely. This claim is asserted notwithstanding the fact that at the very time the bonds were voted and issued the laws of Texas plainly and explicitly provided that such special land assessments might be made against lands benefited by the District (Article 7880-147z, Sec. 9, R. C. S. Texas, 1925) and in the face of the expressed constitutional provision of Section 59 of Article XVI of the Constitution of the State of Texas, under which respondent District exists, providing that such bonds may be paid out of taxes "equitably distributed." It is also in the face of the record showing that the value of petitioner's land has been enhanced from that of six to ten dollars an acre as dry ranch land to that of ninety-five to one hundred and thirty-five dollars an acre as irrigable land (R. p. 68).

The Supreme Court of Texas has repeatedly held that benefit assessments against lands enjoying benefits from improvements of the character made by respondent District in this case might properly be made for retiring indebtedness incurred for the construction of such improvements. **City of Wichita Falls** vs. **Williams,** 119 Tex. 163, 26 S. W. (2) 910, 79 A. L. R. 704; **Anchor** vs. **Wichita County Water Control and Improvement District No. 2,** 123 Tex. 105, 66 S. W. (2) 657.

In the case of **Miller** vs. **State,** 133 Tex. 498, 128 S. W. (2) 1134, the Supreme Court of Texas, in pass-

ing upon the incorporation of existing statutory provisions in a proposition voted upon by the voters of an improvement district, held that—

> "When the District voted on the proposition of the issuance of construction bonds, the provisions of the applicable statutes became a part of the proposition voted upon. San Saba County vs. McCraw, 130 Tex. 54, 108 S. W. (2) 200."

That decision is in accord with the general rule established and applied by both Federal and State decisions. 16 **C. J. S.**, 693; 85 **A. L. R.** 245.

This case was correctly determined by the Courts of the State of Texas and the petition for writ of certiorari is without merit and should be denied.

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